UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GUADALUPE SALAZAR, et al.,

Plaintiffs,

v.

MCDONALD'S CORP., et al.,

Defendants.

Case No. 14-cv-02096-RS

ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

In 2010, defendants McDonald's Corporation and McDonald's USA, LLC ("McDonalds") entered into a franchise agreement with the Bobby O. Haynes Sr. and Carol R. Haynes Family Limited Partnership ("Haynes").[1] The agreement allocated control of the franchised restaurants along a fine contractual line, with McDonalds setting general operational standards and Haynes in charge of personnel. Plaintiffs Guadalupe Salazar, Judith Zarate, and Genoveva Lopez are crew members at Haynes-owned McDonalds franchise restaurants in Oakland, California. In this putative class action, they seek to recover wages allegedly owed to them by Haynes and by McDonalds as franchisor. McDonalds moves for summary judgment on the grounds it does not jointly employ the named plaintiffs, given it does not retain or exert direct or indirect control over their hiring, firing, wages, or working conditions.

Viewing the undisputed evidence in the light most favorable to plaintiffs, McDonalds did not retain or exert direct or indirect control over plaintiffs' hiring, firing, wages, hours, or material

[1] This partnership is composed of Bobby Haynes, Sr., Carol O. Haynes, and Michele Haynes-Watts. Bobby Haynes, Sr.'s children—Bobby Haynes, Jr., Kimberly Keeton, and Melanie Pomales—work for the partnership. *See* Haynes Sr. Dep. 15:2–17:5.

working conditions. Nor did McDonalds suffer or permit plaintiffs to work, engage in an actual agency relationship, participate in a conspiracy, or aid and abet the alleged wage and hour violations. Summary judgment for McDonalds therefore is warranted as to those legal theories. The motion for summary judgment also will be granted as to plaintiffs' negligence claim. The motion must be denied in part, however, because plaintiffs' Labor Code claims may proceed under an ostensible agency theory.[2]

II. BACKGROUND[3]

McDonalds operates a system of restaurants that prepare, package, and sell a limited menu of value-priced foods. Like others in the industry, McDonalds adopted a franchise business model to drive the expansion of its products and services from coast to coast. Steinhilper Decl. ¶¶ 6–7. In 2010, McDonalds and Haynes entered into a franchise agreement permitting Haynes to operate restaurants in accordance with the "McDonald's System." *Id.* Exs. A, B. Haynes ultimately acquired eight McDonalds franchises in Oakland and San Leandro, California. *Id.*

Plaintiffs Guadalupe Salazar, Judith Zarate, and Genoveva Lopez are crew members at McDonalds franchise restaurants operated by Haynes. On March 12, 2014, on behalf of themselves and a putative class, they brought suit to recover wages McDonalds allegedly failed to pay them in violation of California law. *See* Dkt. No. 1. They aver, among other things, managers edit or delete time recorded by the punch-in and punch-out system, require off-the-clock work, and fail to pay meal period, rest period, and mandated overtime compensation. First Amended Complaint ("FAC") ¶ 150. Plaintiffs specifically assert various claims under the California Labor Code as well as for negligence, violation of the Private Attorneys General Act ("PAGA"), Labor Code §§ 2698 *et seq.*, and violation of California's Unfair Competition Law ("UCL"), Cal. Bus. &

[2] The motion will also be denied as to the derivative claims under the Private Attorneys General Act ("PAGA"), Labor Code §§ 2698 *et seq.*, California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200 *et seq.*, and California Code of Civil Procedure § 1060, none of which were directly addressed by the parties.

[3] The background section provides a general overview of the dispute. A more detailed analysis of the evidentiary record appears in the discussion below.

Prof. Code §§ 17200 *et seq.*

In May 2016, the parties stipulated to dismissal of McDonald's Restaurants of California, Inc. Dkt. No. 86. The remaining defendants—McDonald's Corporation and McDonald's USA, LLC—moved for summary judgment on plaintiffs' claims the same day. Dkt. No. 87.

III. LEGAL STANDARD

Summary judgment is proper "if the pleadings and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323–24 (1986). The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings and admissions on file, together with the affidavits, if any which it believes demonstrate the absence of a genuine issue of material fact." *Id*. at 323 (citations and internal quotation marks omitted). If it meets this burden, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which he bears the burden of proof at trial. *Id*. at 322–23.

The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, *i.e*., "facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). "Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 588 (1986).

The court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. *Masson v. New*

Yorker Magazine, Inc., 501 U.S. 496 (1991) (citing *Anderson*, 477 U.S. at 255); *Matsushita*, 475 U.S. at 588 (1986). It is the court's responsibility "to determine whether the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." *T.W. Elec. Serv. v. Pac. Elec. Contractors*, 809 F.2d 626, 631 (9th Cir. 1987). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita*, 475 U.S. at 587.

The 2010 amendments to Rule 56 clarified a party may request summary judgment "not only as to an entire case but also as to a claim, defense, or part of a claim or defense." Fed. R. Civ. P. 56 advisory committee's note to 2010 amendments. Courts may therefore dispose of less than an entire case or claim by granting what Rule 56 now refers to as partial summary judgment.

IV. DISCUSSION

The California Labor Code imposes the duty to pay minimum wages only upon employers. *Martinez v. Combs*, 49 Cal. 4th 35, 49 (2010). Accordingly, McDonalds is potentially liable for the asserted wage and hour claims only if it employs the named plaintiffs.[4] McDonalds asserts it does not employ the Haynes workers because it does not retain or exert direct or indirect control over their hiring, firing, wages, or working conditions. Plaintiffs insist McDonalds' contractual and economic power, coupled with its regular monitoring of Haynes' compliance with its standards, enables McDonalds to maintain operational control over all relevant workplace conditions. At bottom, the Franchise Agreement belies the first component of plaintiffs' argument, and the record belies the rest. McDonalds' operating standards protect brand identity and integrity, but exclude hiring, firing, and other personnel matters.

[4] California courts have not resolved the scope of *Martinez*'s application to wage and hour claims arising outside of section 1194 of the Labor Code. *See Johnson v. Serenity Transp., Inc.*, 141 F. Supp. 3d 974, 995–96 (N.D. Cal. 2015). Courts have applied *Martinez* despite this uncertainty, as will be done here. *See id.* at 996 (collecting cases).

Plaintiffs' negligence claim also falls short under California's "new right-exclusive remedy" doctrine. *See Rojo v. Kliger*, 52 Cal. 3d 65, 79 (1990). Plaintiffs do raise a triable issue regarding the existence of an ostensible agency relationship, and thus the motion for summary judgment will be granted in part and denied in part.

A. Joint Employer Liability

As a preliminary matter, the parties dispute the authority applicable to the determination of joint employer liability. They agree on one point—*Martinez v. Combs*, 49 Cal. 4th 35 (2010), supplies the analytical framework. They part company over the relevance of *Patterson v. Domino's Pizza, LLC*, 60 Cal. 4th 474 (2014).

In *Martinez*, the California Supreme Court considered whether three seasonal agricultural workers directly employed by a strawberry farmer could hold liable for wage violations two produce merchants through whom the farmer sold strawberries. 49 Cal. 4th at 42. The court first found the term "employ" has three alternative definitions: "(a) to exercise control over the wages, hours or working conditions, *or* (b) to suffer or permit to work, *or* (c) to engage, thereby creating a common law employment relationship." *Martinez*, 49 Cal. 4th at 64.

It then investigated the connections between the farmer, the merchants, and the agricultural workers, and concluded the merchants did not employ the workers under any of these definitions. *Id.* at 68–77. On the control side of the equation, the court noted the merchants could decide the amount of the advance paid to the farmer, and thereby indirectly control the farmer's ability to pay his workers. *Id.* at 71–72. Moreover, "[b]y ceasing to buy strawberries," the merchants could "force[] [the farmer] to lay off workers or to divert their labor to other projects." *Id.* at 69. Yet "any substantial purchaser of commodities might force similar choices on a supplier by withdrawing its business," so "[s]uch a business relationship, standing alone, d[id] not transform the purchaser into the employer of the supplier's workforce." *Id.* at 70.

Next, pursuant to the contract, the court noted merchants regularly sent field representatives to communicate with the workers and confirm the crops were of the quality required for purchase, marketing, and sale under the merchants' labels. *Id.* at 45–46. The court

found these activities did not transform the merchants into the workers' joint employers because there was no evidence the workers "viewed the field representatives as their supervisors or believed they owed their obedience to anyone but [the farmer] and his foremen." *Id.* at 76. In other words, the farmer alone employed the workers because he "decided which fields to harvest on any given day," *id.* at 43, "hired and fired his employees, trained them when necessary, told them when and where to report to work, when to start, stop and take breaks, provided their tools and equipment, set their wages, paid them, handled their payroll and taxes, and purchased their workers' compensation insurance." *Id.* at 45.

While plaintiffs would stop with the decision in *Martinez* and ignore the analysis in *Patterson* as inapposite, a distorted view of operative law would be the result. In *Patterson*, issued four years after *Martinez*, the California Supreme Court decided the question: "whether a franchisor may be considered an 'employer' who is vicariously liable for torts committed by someone working for the franchisee." 60 Cal. 4th at 492. The decision is instructive because it elucidates the common law definition of employment in the franchisor context, *id.* at 499, and the common law definition is incorporated as a component of the test articulated in *Martinez*. Not just that, the opinion focuses on the idiosyncracies of the franchising relationship, and denigrates reliance on the court's older decisions, "none of which concerned franchising." *Id.* at 493.

The plaintiff in *Patterson* was harassed by her supervisor while working for a Domino's franchisee, and argued the franchisor was vicariously liable for the workplace harassment. *Id.* at 477. The court concluded the "imposition and enforcement of a uniform marketing and operational plan cannot *automatically* saddle the franchisor with responsibility for employees of the franchisee." *Id.* Instead, the franchisor must "exhibit the traditionally understood characteristics of an 'employer' or 'principal;' i.e., it has retained or assumed a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees." *Id.* Thus, "the mere fact that the franchisor has reserved the right to require or suggest uniform workplace standards intended to protect its brand, and the quality of customer service, at its franchised locations is not,

standing alone, sufficient to impose 'employer' or 'principal' liability on the franchisor for statutory or common law violations by one of the franchisee's employees toward another." *Id.* at 498 n.21.

Applying this standard, the court observed the franchise agreement permitted use of the "Domino's System" and required compliance with a separate Managers Reference Guide, *id.* at 484, which prescribed detailed standards and procedures, *see id.* at 478. "These standards were vigorously enforced through representatives of the franchisor who inspected franchised stores." *Id.* at 478. Stores were rated on "customer orders, food preparation, product packaging, employee uniforms, and store cleanliness." *Id.* at 486. Domino's also provided "an orientation program for new employees on the store's computer system, i.e., the 'PULSE' system," *id.* at 482, which was a "comprehensive sales and accounting program that Domino's required franchisees to buy and use in their stores," *id.* at 482 n.2. As a practical matter, the franchisee felt he always had to say "yes" to Domino's representatives, *id.* at 485, as franchisees who did not follow the suggestions were "out of business very quickly," *id.* at 506.

On the other hand, the contract "described the parties as 'independent contractors,' regardless of any training or support on Domino's part." *Id.* at 484. It also released Domino's from liability for any damages to any person or property arising directly or indirectly out of the operation of the franchise. *Id.* The contract further stated the parties had no principal-agent relationship, and Domino's disclaimed any relationship with the franchisee's employees. *Id.* On this record, the court found Domino's "had no right or duty to control employment or personnel matters for [the franchisee]." *Id.* at 501.

The "parties' characterization of their relationship in the franchise contract is not dispositive," however, so the court proceeded to examine the record. *Id.* at 501. Perhaps most important, there was "essentially uncontradicted evidence that the *franchisee* made day-to-day decisions involving the hiring, supervision, and disciplining of his employees." *Id.* at 478. The record also revealed the franchisee "imposed discipline consistent with his *own* personnel policies, declined to follow the ad hoc advice of the franchisor's representative[s], and neither expected nor

sustained any sanction for doing so." *Id.* at 479 (emphasis added). As "Domino's lacked the general control of an 'employer' or 'principal' over relevant day-to-day aspects of the employment and workplace behavior of the [franchisee's] employees," *id.* at 499, the court concluded there was "no basis on which to find a triable issue of fact that an employment or agency relationship existed," *id.* at 503.

Plaintiffs correctly observe *Patterson* involved a claim under California's Fair Employment and Housing Act. The franchisor's liability, however, depended on whether it was an "employer" of the franchisee's employees, which was examined using "traditional common law principles of agency and respondeat superior." *Id.* at 499. Given these principles supply the "proper analytical framework . . . for franchising generally," it is appropriate to look to *Patterson*'s analysis for guidance. *Id.*

B. Joint Employer Status Under *Martinez* Prong 1

Under prong one of the *Martinez* three prong definition, an entity employs a worker if it "directly or indirectly, or through an agent or any other person . . . exercises control over the[ir] wages, hours, or working conditions."[5] IWC Order § 2; *Martinez*, 49 Cal. 4th at 64. The strawberry farmer in *Martinez* supplies helpful guidance for applying this standard. Under the terms of his contract, he alone employed his workers, and in practice, he "decided which fields to harvest on any given day," *id.* at 43, "hired and fired his employees, trained them when necessary, told them when and where to report to work, when to start, stop and take breaks, provided their

[5] In *Ochoa v. McDonald's Corporation*, 133 F. Supp. 3d 1228 (2015)—a case virtually identical to this one—the court observed "this language is potentially quite broad in scope," but found "California courts have circumscribed it by denying employer liability for entities that may be able to influence the treatment of employees but lack the authority to *directly* control their wages, hours or conditions." *Id.* at 1233 (emphasis added). Plaintiffs insist *Ochoa* erred by limiting "employer" to entities with "authority to directly control the [workers'] wages, hour or conditions" and in finding it "dispositive" that the franchisee made the final hiring, firing, wage, and staffing decisions, without regard to the franchisor's involvement and indirect control. Opp'n at 3:19 n.4. In any event, the court in *Ochoa* proceeded to examine the aspects of indirect control highlighted by the plaintiffs. *See, e.g., Ochoa*, 133 F. Supp. 3d at 1236 ("[I]t is clear that McDonald's has the ability to exert considerable pressure on its franchisees."). It simply found them insufficient in light of the examples provided in *Martinez* and *Patterson*. *See id.* (rejecting arguments based on "McDonald's strength as a franchisor").

tools and equipment, set their wages, paid them, handled their payroll and taxes, and purchased their workers' compensation insurance," *id.* at 45.

Plaintiffs set forth a great deal of evidence in an attempt to distinguish this case from *Martinez*. They argue principally that McDonalds retains a contractual right of control, and *indirectly* controls working conditions by articulating optional standards and subsequently conducting graded visits. At the end of the day, however, several crucial facts cannot reasonably be disputed: (1) McDonalds did not directly or indirectly retain the right to control employment or personnel matters at the Haynes restaurants; (2) McDonalds is not involved in hiring Haynes employees; (3) McDonalds is not involved in disciplining Haynes employees; (4) McDonalds is not involved in setting work schedules or dispensing specific work assignments; (5) McDonalds is not involved in determining when to provide rest breaks or meal periods; (6) McDonalds does not set the rates of pay or dispense pay to Haynes employees; (7) restaurant managers oversee Haynes employee training; (8) Haynes runs its own orientations; (9) Haynes is free to reject (and did reject) business advice it receives from McDonalds consultants; (10) plaintiffs went to Haynes with questions and concerns about their jobs; and (11) Haynes, not McDonalds, purchased workers' compensation insurance. In light of these facts, as discussed in detail below, and the guidance provided in *Martinez*, McDonalds did not exercise direct or indirect control over plaintiffs' wages, hours, or working conditions.

1. Franchise Agreement

The parties mutually agree Haynes is an "independent contractor responsible for all obligations and liabilities of, and for all loss or damage to, the Restaurant and its business." Franchise Agreement ("FA") § 16. The contract also states "[Haynes] and McDonald's are not and do not intend to be partners, associates, or *joint employers* in any way and McDonald's shall not be construed to be jointly liable for any acts or omissions of [Haynes] under any circumstances." *Id.* (emphasis added). It further provides Haynes "shall have no authority, express or implied, to act as agent of McDonald's." *Id.* Finally, the only contractual provisions directed at labor issues require franchisees to "employ adequate personnel," FA § 12(g), purchase

workers' compensation insurance, *id.* §§ 17(a), (c), and to cause their employees "to (i) wear uniforms of such color, design, and other specifications as McDonald's may designate from time to time; (ii) present a neat and clean appearance; and (iii) render competent and courteous service to Restaurant customers," *id.* § 12(h). Applying *Martinez*, mindful of *Patterson*'s gloss, such policies are not problematic.

Plaintiffs' contention that the agreement does not preclude the franchisor's direct involvement in personnel decisions is inconsistent with the undisputed facts. The agreement incorporates explicitly the McDonalds business manuals, and thus the Operations and Training ("O&T") manual. FA § 4. That manual provides that policies related to personnel practices, crew management and scheduling, and training are optional for franchisees. The "People" section states: "Franchisees are independent employers who make their own decisions and policies regarding employment-related matters pertaining to their employees. Franchisees may choose to use part, all, or none of the contents in these materials that will be helpful to them in operating their own McDonald's restaurants." Steinhilper Decl. Ex. C. The "Training" section provides: "Franchisees are independent employers and are solely responsible for hiring, assigning roles and responsibilities to, training, and advancing their employees. Franchisees should establish their own policies and may choose the information from this chapter that will be helpful to them in operating their business." *Id.* Ex. D. The "Crew Management and Scheduling" chapter provides: "Subsidiaries, affiliates, and licensees establish their own human resources policies and may choose the information from this chapter that will be helpful to them in operating their businesses." *Id.* Ex. E. In short, the franchise agreement is clunkier than in *Martinez*, as franchisees must "adopt and use" a manual that provides them with complete autonomy over personnel decisions. Nonetheless, it strongly evinces Haynes has complete discretion over "the selection, hiring, firing, supervision, assignment, direction, setting of wages, hours, and working conditions of [its] employees,"[6] *Martinez*, 49 Cal. 4th at 77, and plaintiffs offer no facts to the

[6] Notably, a related manual, the ROIP People Self-Assessment Guide, states "[o]wner/operators are responsible for all employment related matters in their restaurant(s) and exercise complete

contrary.

Next, plaintiffs submit the agreement establishes a generic right to control the terms and conditions of employment through compliance with the "McDonald's System." The contract requires "strict adherence to McDonald's standards and policies as they exist now and as they may be from time to time modified." FA § 1(d). In plaintiffs' eyes, this statement means McDonalds can modify its manuals to revoke the autonomy of the franchisees, and in that sense it retains the right to control the material working conditions of their employees.

This thread is too thin to establish liability as a joint employer. In *Martinez*, the court assumed without deciding "the *right* to exercise control over the manner in which work is performed is sufficient to prove the existence of an employment relationship." *Id.* at 76. It then found the argument unavailing because the contract did not explicitly give the merchants the right to direct the farmer's employees, nor did anyone believe the merchants had any such right. *Id.* at 76–77 (distinguishing *S.G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341 (1989)). The same is true here—even if McDonalds retains the right to update its business manuals, the agreement still lacks any contractual right authorizing McDonalds to direct the Haynes employees in their work.[7] It also is worth noting *Patterson* insists analysis of the franchise relationship must respect "contemporary realities," and periodic updates to manuals provide a continuous means of "protecting the trademarked brand." 60 Cal. 4th at 490. Thus, "the mere fact that the franchisor has *reserved* the right to require or suggest uniform workplace standards . . . is not, standing alone, sufficient to impose 'employer' or 'principal' liability on the franchisor."[8] *Id.* at 498 n.21 (emphasis added).

Finally, plaintiffs argue more specifically the agreement requires Haynes to employ

---

control over the work, working conditions, and terms and conditions of employment for employees in their restaurants." Steinhilper Decl. Ex. F.

[7] As detailed below, the factual record also belies the direct or indirect exercise of any such right. *Id.* at 71–72.

[8] Plaintiffs' contrary authority is not from California or pre-dates both *Martinez* and *Patterson*.

"adequate personnel," and states correspondingly it is a material breach to spurn any standard prescribed by the McDonalds System. This vague operational obligation clearly is directed toward protecting "the quality of customer service," *Patterson*, 60 Cal. 4th at 479, and in any event does not demonstrate the retention of control over day-to-day personnel matters. That McDonalds theoretically would have to terminate the agreement to get its way only emphasizes that fact.[9] Further, in light of Haynes' autonomy, McDonalds disclaims inadequate staffing would even constitute a material breach. The record supports that assertion: Haynes staffed its restaurants inadequately in practice, yet neither expected nor sustained any sanction for doing so. Haynes, Sr. Dep. Ex. 3; Haynes, Jr. Dep. Ex. 33; Haynes, Sr. Dep. 203:16–205:22. At its core, the franchise agreement does not afford McDonalds direct or indirect control over Haynes personnel.

2. Wages

The record reflects Michele Haynes-Watts, with input from other Haynes employees, sets the wages for all crew members at Haynes operated restaurants. Haynes-Watts Dep. 224:21–225:10. Haynes also uses its own payroll provider, Haynes Jr. Dep. 255:4–22, to whom Haynes employees transmit time record data for processing, Haynes-Watts Dep. 61:3–22. The payroll provider formatted the checks and wage statements that go to Haynes employees, Haynes-Watts Dep. 191:15–17, and only Haynes is listed as the employer on paystubs, Haynes-Watts Dep. Ex. 73–74, which are signed by Bobby Haynes, Senior, *id.* Much like the franchisee in *Patterson*, Haynes further maintains its own bank accounts, *see* Haynes Jr. Dep. 264:9–11; Haynes-Watts Dep. 225:23–226:5, and McDonalds lacks access to or control of Haynes' payroll system and its bank accounts, Haynes Jr. Dep. 262:24–264:11. Lastly, plaintiffs testified uniformly they spoke only with Haynes managers about their wages. Lopez Dep. 66:1–67:5; Salazar Dep. 106:4–107:15; Zarate Dep. 60:6–14. The inference fairly supported by this evidence is that McDonalds does not exercise control over this domain. *See also* Haynes-Watts Dep. 225:8–10.

[9] Termination is also akin to the merchants' ability to withdraw their business, as detailed in *Martinez*, 49 Cal. 4th at 69–70, which in practice is not sufficient to constitute indirect control, even if it does permit influence.

Plaintiffs assert McDonalds exercises *indirect* control over Haynes employees' compensation by imposing reinvestment and financial viability standards, and dictating non-labor costs, thereby limiting the amount Haynes can pay while remaining profitable. As detailed above, this precise type of argument was found wanting in *Martinez*. 49 Cal. 4th at 71 (rejecting argument that "contractual relationship" permitted merchants to exert "indirect control" over employees' wages).

3. Hiring, Firing, and Discipline

The general managers make the hiring decisions in response to applications for employment, Haynes-Watts Dep. 220:21–221:4; Haynes Jr. Dep. 260:17–19, and Haynes employees alone conduct hiring interviews, Haynes-Watts Dep. 221:5–12; Keeton Decl. ¶ 4. The general managers also conduct employee performance evaluations, Haynes-Watts Dep. 221:25–226:12, and are responsible for imposing employee discipline when warranted, Haynes-Watts Dep. 222:13–223:9.

Zarate testified she was interviewed and hired by a Haynes restaurant supervisor. Zarate Dep. 24:2–9. Likewise, Salazar attests she was interviewed by Michele Haynes, and then subsequently hired. Salazar Dep. 35:2–36:5. Lopez was interviewed by Bobby Haynes Sr. at the San Leandro office, and later was told by her restaurant manager she got the job. Lopez Dep. 39:5–43:12. As to discipline, both Salazar and Zarate recalled incidents in which they received warnings from their restaurant managers, *see* Salazar Dep. 201:1–24; Zarate Dep. 95:17–98:22, and Salazar sometimes discussed written warnings she received with her manager, Zarate Dep. 95:17–98:22. This record does not reflect McDonald's exercises control over hiring or employee discipline.

McDonalds' business consultants evaluate Haynes on its use of an online tool known as "Hiring to Win." Haynes Sr. Dep. 145:17–146:1. Through that website, individuals can apply for employment at a Haynes restaurant, even though the screening questions were written by McDonalds, not Haynes. Haynes-Watts Dep. 172:2–12. The program separates applicants into three categories—green, yellow, or red. Virtually all of the McDonalds restaurants in the region

utilize Hiring to Win. Gehret II Dep. Ex. 29. at HAYNES_260332. Given that fact, plaintiffs argue a jury could find the program is mandatory, and that McDonalds thereby "influences" hiring decisions at the Haynes restaurants.

The record belies that assertion. The Hiring to Win tool indisputably is an optional resource made available to franchisees. *See* Haynes-Watts Dep. 171:15–20, 172:13–16; Haynes Jr. Dep. 261:14–17. Haynes elects to use it, but receives only half of its applications through this method. *Id.* 172:13–16. Additionally, Haynes does not send the applications to its managers with the online tool's assessments, *id.* 173:5–22, and does not use the interview guides, *id.* 174:10–15. The record reflects interviews and hiring decisions are made by restaurant managers. Taken together, these facts do not evince McDonalds exercises any actual control over employee hiring.

4. Software

McDonalds requires Haynes to use a Point of Sale ("POS") system to process and track transactions, Lewis Dep. 44:7–11, and a proprietary program called the In Store Processor ("ISP") to open and close that system each day, *id.* 60:7–61:18, 63:18–22. The ISP has a number of optional features that Haynes may elect to use, including software related to timekeeping, discipline, scheduling, payroll, and restaurant inventory. *Id.* 63:9–22. *See also* Haynes Jr. Dep. 257:9–259:9. McDonalds also makes available a number of additional packages Haynes can utilize to help run its business, including the e*Restaurant package, the Dynamic Shift Positioning Tool ("DSPT"), and the Staffing, Scheduling & Positioning ("SSP") tool.

While there is no dispute McDonalds does not require use of these programs for scheduling, timekeeping, or wage and hour functions, plaintiffs submit "no economically rational franchisee" would decline such usage given the costs and risks of alternative options. Opp'n at 14:4–7. McDonalds audits restaurants with these programs in mind, *see* Taylor Decl. Ex. A, and Haynes accordingly adopted many of these features. *See, e.g.*, Haynes-Watts Dep. 50:18–51:6. What is more, alleged programming errors in this optional software are driving the wage and hour

violations.[10] Given McDonalds pressures franchisees to adopt the flawed software, and Haynes relied on it to record employee time, Haynes-Watts Dep. 50:18–20, 55:13–15, 58:6–59:13, 60:5–14, plaintiffs submit McDonalds exercises control over their material working conditions.

California authority suggests the provision of such software does not convert a franchisor into a joint employer, even when the programs allegedly give rise to putative wage and hour violations. In *Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th 1176 (2012), the California Court of Appeal applied *Martinez* in a situation where a franchisor, 7-Eleven, contractually required its franchisee to use 7-Eleven's payroll service. *See id.* at 1190–91. Pursuant to that system, franchisee employees used an In Store Processor to record their time. *Id.* at 1181. The franchisee then submitted to 7-Eleven the hourly rate and number of hours worked by its employees each week. *Id.* at 1190. At that point, 7-Eleven applied its "payroll method," akin to the software glitches here, which converted the time worked to a total number of minutes, but truncated the number beyond the hundredth decimal place. *Id.* at 1181. Plaintiffs argued this truncation method deprived them of the mandated minimum wage, and established 7-Eleven's control over their wages and hours to support the imposition of vicarious liability. The court concluded to the contrary as to all three definitions of employment described in *Martinez*, given "7-Eleven exercised no control over [the franchisee's] employees, including their hiring or firing, rate of pay, work hours and conditions." *Id.* at 1190. *See also Futrell v. Payday Cal., Inc.*, 190 Cal. App. 4th 1419 (2010) (declining to find payroll company is a joint employer liable for allegedly failing to pay overtime). It is likewise worth noting that *Patterson* involved a "comprehensive sales and

[10] The ISP scheduling application establishes shift lengths and crew schedules based on projected customer transactions and calculations of how many crew will be needed throughout the day. *See* Lewis I Dep. 206:2–9; Lewis II Dep. 100:14–101:13, 266:17–267:2. Similarly, the DPST determines where crew members should be positioned throughout their shifts and what duties they should perform. Stein Dep. 194:7–23, 197:19–198:6. Importantly, the labor law settings identify which precise shifts require meal periods and rest breaks. According to plaintiffs, however, the scheduling function does not schedule any rest breaks, any required second meal periods, and throws off the scheduling of subsequent meal periods when the first one is incorrectly set. Plaintiffs also insist the ISP does not flag when individuals are owed premium pay for missed and late breaks, and incorrectly calculates overtime by assigning all hours for overnight shifts to a single day.

accounting program that Domino's required franchisees to buy and use in their stores." 60 Cal. 4th at 482 n.2. Yet that mandated program did not establish Domino's control over wages, hours, or working conditions. Here, while the record reflects McDonalds pressures franchisees to use the optional scheduling and timekeeping functions, that alone does not establish the requisite control in light of the above authority.

5. Training

New crew members receive an orientation packet compiled by Haynes, though some of its content may have originated with McDonalds. Haynes Sr. Dep. 146:11–18. A Haynes employee then conducts an orientation at the San Leandro office. Haynes-Watts Dep. 22:4–23:11. Plaintiffs' actual experiences onboarding with Haynes confirm this framework. *See, e.g.*, Salazar Dep. 55:9–57:17; Lopez Dep. 84:7–10.

Once on the job, new employees are trained by managers and crew members. *See, e.g.*, Zarate Dep. 83:19–22; Haynes-Watts Dep. 21:9–10. For instance, Salazar and Lopez testified their managers arranged for them to watch training videos. Salazar Dep. 66:10–16; 169:12–170:23; Lopez Dep. 81:4–86:12. Lopez further explained her manager took her to the kitchen to show her how everything worked. Lopez Dep. 83:1–4. She started with french fries, hashbrowns, and meat, then moved to food preparation, which involved yogurt, salad, cheese, and various breakfast ingredients. Lopez Dep. 83:9–86:17. Plaintiffs also testified managers and employees trained them on how to record their hours, told them about meal and rest break policies, and showed them how to prepare new products. Lopez Dep. 102:21–25, 192:24–193:23; Salazar Dep. 171:11–18; Zarate Dep. 82:17–83:9. This record reflects training was handled by Haynes employees.

Plaintiffs assert McDonalds dictates the contents of the orientation packet and videos, and through its consultants, directly trains managers and other crew members. The latter topic is addressed below, and the former is not problematic. In *Martinez*, the merchants' representatives explained to the farmer and his foremen how packing was to be done, and the farmer and his team then passed that training down to the agricultural workers. 49 Cal. 4th at 76. This basic

orientation did not cause the court pause, nor does it raise a triable issue here. *See Ochoa*, 133 F. Supp. 3d at 1237 (noting these aspects are not the type required to find McDonalds exercised control over wages, hours or working conditions).

Plaintiffs also point out McDonalds requires Haynes managers to undergo training on wage and hour issues, Taylor Decl. Ex. B, which likely filters down to restaurant employees notwithstanding Haynes' discretion over personnel matters. Once again, such training, though an influence, does not reflect indirect control over plaintiffs' working conditions because McDonalds has no right or ability to participate in the decision-making process after the training is completed.

6. Supervision and Working Environment

The general managers determine the employees' work schedules based on experience, store hours, and expected sales volume. Haynes Jr. Dep. 259:11–260:14. They also decide when to permit employees to take their meal and rest breaks. Haynes-Watts Dep. at 223:10–224:7. The managers further determine the specific work assignments that are given to the employees in each store, Haynes Jr. Dep. at 261:21–262:5, and only the managers (either restaurant or swing) may edit a crew member's time records. *Id.* at 262:13–18. Uniform requirements, Haynes-Watts Dep. 225:11–20, employee evaluations, Haynes-Watts Dep. 221:25–226:12, and discipline are also handled by the managers, Haynes-Watts Dep. 222:13–223:9. Plaintiffs confirmed managers set work hours, Zarate Dep. 55:8–11; Salazar Dep. 95:18–21; Lopez Dep. 71:20–25, assign them duties, Lopez Dep. 54:7–12; Salazar Dep. 98:9–12; Zarate Dep. 58:13–16, and tell them when they are needed, Zarate Dep. 75:3–8; Salazar Dep. 147:17–21; Lopez Dep. 77:2–16. Requests for accommodations, *see, e.g.*, Lopez 74:14–17, and questions about the job are also addressed only to Haynes employees, *see, e.g.*, Salazar Dep. 188:19–23; Zarate Dep. 125:5–17. This record reflects Haynes, not McDonalds, is responsible for employee supervision.

Plaintiffs point out McDonalds provides franchisees with optional resources like workplace positioning guides, then grades them on their uptake, allowing McDonalds to exercise "effective" control over restaurant operations. They also note every restaurant must be managed by a graduate of McDonalds-run Hamburger University, Dubois Dep. 230:9–13, and argue

McDonalds forced Haynes to designate "department managers" as part of the Restaurant Department Manager ("RDM") initiative. The undisputed evidence, however, reflects RDM was optional, and Haynes in fact ultimately spurned it. Haynes Sr. Dep. 93:6–15, 106:4–7; Haynes Jr. Dep. 148:10–150:8; Haynes-Watts Dep. 109:3–5. Further, the adoption and monitoring of customer service metrics does not give rise to a triable issue of fact. *See Martinez*, 49 Cal. 4th at 76 (merchant set packing standard, taught it to workers through representatives, and enforced standard, but did not thereby "supervise[] or exercise[] control over [farmer's] employees"); *Patterson*, 60 Cal. 4th at 498 n.21 (adoption and enforcement of "uniform workplace standards intended to protect [franchisor's] brand" insufficient to support vicarious liability).

7. Consultants

McDonalds is contractually obligated to consult with Haynes in connection with the operation of the restaurants. FA § 3. These consultants provide marketing and general business advice, and ensure compliance with McDonalds' contractual standards. McDonalds readily admits consultants also evaluate franchisees against its National Franchising Standards ("NFS"), a set of metrics McDonalds uses to make decisions on whether to continue or expand a franchising relationship. The NFS provide they "are internal guidelines which McDonald's may apply, modify or eliminate as it deems appropriate. They are not intended and do not create or modify any contract rights or obligations. As always, those rights and obligations are determined only by McDonald's signed, written Franchise Agreements." McRee Decl. Ex. EE. In other words, "[t]he Standards are not intended to, and do not necessarily address whether an Owner/Operator is in compliance with the Franchise Agreement," *id.*, though eligibility for "growth and rewrite"—the renewal of the relationship—appears to require compliance with the franchising standards, Haynes Sr. Dep. 64:17–21.

Undoubtedly, McDonalds can exert significant economic pressure on Haynes through these reviews, *see* Slater-Carter Decl. ¶ 9, but the consultants themselves are limited to providing advice about the operation of the restaurants. That is, consultants do not "have any authority in [the Haynes] business whatsoever." Haynes Jr. Dep. 252:11–16. They cannot make staffing

decisions, *id.* 251:25–252:16, access crew schedules, *id.* 254:2–4, or obtain payroll reports, *id.* 254:18–255:2. Haynes can reject any business advice it receives from McDonalds consultants, *id.* 250:3–23, and has in fact rejected McDonalds' advice in the past, *id.* 250:25–251:24.

Plaintiffs submit the consultants' instructions amount to the exercise of control, but that proposition was rejected squarely both in *Martinez* and *Patterson*. In *Martinez*, field representatives showed workers how to pack, checked "packed containers as workers brought them from the field," and "sp[oke] directly to the workers, pointing out mistakes in packing." 49 Cal. 4th at 76. There, as here, this conduct did not support the imposition of vicarious liability because the workers did not "view[] the field representatives as their supervisors or believe[] they owed their obedience to anyone but [the farmer] and his foremen." *Id.* at 76. In *Patterson*, Domino's representatives "recommended changes in pricing and staffing levels," "trained franchisees when their doors first opened or when a new product was launched," and "coach[ed] franchisees and employees" on a host of different topics. 60 Cal. 4th at 486. The court found the "enforcement of a uniform marketing and operational plan" was central to modern franchising, and concluded such oversight did not subject a franchisor to vicarious liability in the absence of control over "relevant day-to-day aspects of the workplace behavior of the franchisee's employees." *Id.* at 478. Lastly, once again, *Martinez* said the ability to impose economic pressure, standing alone, does not make the party who possesses that ability a joint employer. *Martinez*, 49 Cal. 4th at 69–70 (finding "[s]uch a business relationship, standing alone, does not transform the purchaser into the employer of the supplier's workforce"). That McDonalds can exert significant economic pressure is not enough to subject it to vicarious liability.

8. Property Ownership

McDonalds owns the property it leases to Haynes for three of its restaurants, and is the primary leaseholder for the other properties, which are subleased to Haynes. Gordon Decl. ¶ 11. The Franchise Agreement also affords McDonalds the right to enter and take possession of the premises in the event of a material breach of the contract so McDonalds can protect its goodwill. FA § 20(a). Plaintiffs insist this arrangement allows McDonalds to exert control over the

premises, and thus indirectly to exercise control over the employees' working conditions. In *Martinez*, however, the farmer likewise leased two sites from one of the produce merchants, who similarly retained a contractual "right to enter the leased property." 49 Cal. 4th at 69. That facet was not enough to persuade the court the merchants could exercise the requisite control. So too in the present case.

In sum, the evidence in the record does not raise a triable issue of fact as to whether McDonalds retained or exercised direct or indirect control over plaintiffs' wages, hours, or working conditions. Contractually, McDonalds did not retain the right to control personnel matters at the Haynes restaurants. In practice, McDonalds exerts pressure, like the merchants in *Martinez*, because it theoretically can withdraw its business, but it cannot directly or indirectly set wages, hire or fire, or regulate day-to-day working conditions.

C. Joint Employer Status Under *Martinez* Prong 2

Under the second test articulated in *Martinez*, an entity can be held liable as an "employer" if it "suffer[s] or permit[s]" someone to work. 49 Cal. 4th at 64. The phrase stems from statutes imposing liability on businesses who knew child labor was occurring, but failed to prevent it, notwithstanding the absence of a common law employment relationship. *Id.* at 69. "[T]he basis of liability is the defendant's knowledge of and *failure to prevent* the work from occurring." *Id.* at 70. For instance, "[a] proprietor who knows that persons are working in his or her business . . . while being paid less than the minimum wage, clearly suffers or permits that work by failing to prevent it, *while having the power to do so*." *Id.* at 69 (emphasis added). Applying that standard, *Martinez* found the merchants did not "suffer or permit" the plaintiffs to work even though they benefitted indirectly from the agricultural workers. *Id.* at 70. The court reasoned the merchants lacked "the power to *prevent* [the] plaintiffs from working," given the farmer "had the exclusive power to hire and fire his workers, to set their wages and hours, and to tell them when and where to report to work." *Id.* (emphasis added). The court noted "as a practical matter," the merchants might "have forced [the farmer] to lay off workers or to divert their labor to other projects." *Id.* Yet any purchaser of commodities could exert the same pressure, so that "business relationship,

standing alone," was insufficient. *Id.* at 70.

Here, as in *Martinez*, Haynes alone possesses "the exclusive power to hire and fire [its] workers, to set their wages and hours, and to tell them when and where to report to work." *Id.* McDonalds, like the merchants, can exert significant pressure through the franchising relationship, but that feature, standing alone, simply is not enough to support vicarious liability. Accordingly, McDonalds did not "suffer or permit" plaintiffs to work because it lacked the power to prevent them from working.

D. Joint Employer Status Under *Martinez* Prong 3

According to the third test articulated in *Martinez*, the term "engage" invokes a common law employment relationship. 49 Cal. 4th at 64. Under the common law, "[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." *Borello*, 48 Cal. 3d at 350. "What matters is whether the hirer 'retains all *necessary* control' over its operations." *Ayala v. Antelope Valley Newspapers, Inc.*, 59 Cal. 4th 522, 531 (2014) (quoting *Borello*, 48 Cal. 3d at 357). "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause." *Id.* Courts also consider "several 'secondary' indicia of the nature of a service relationship."[11] *Borello*, 48 Cal. 3d at 350.

Of course, *Patterson* addressed the common law employment relationship in the franchising context. It found "[t]he 'means and manner' test generally used by the Courts of Appeal cannot stand for the proposition that a comprehensive operating system alone constitutes

[11] These factors include the right to terminate at will, "whether the one performing services is engaged in a distinct occupation or business," the "kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision," the skill required in the particular occupation," "whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work," the "length of time for which the services are to be performed," "the method of payment, whether by the time or by the job," "whether or not the work is a part of the regular business of the principal," and "whether or not the parties believe they are creating the relationship of employer-employee." *Borello*, 48 Cal. 3d at 350–51.

the 'control' needed to support vicarious liability."[12] *Patterson*, 60 Cal. 4th at 497. Instead, the franchisor must "retain[] or assume[] a general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees." *Id.* at 478.

Here, as discussed above, Haynes alone controls hiring, firing, wages, hours, and day-to-day aspects of the workplace environment. Under *Patterson*, moreover, the standards and indirect pressure plaintiffs identify is not enough to support vicarious liability in the franchising context. *See, e.g.*, 60 Cal. 4th at 485 (noting franchisee "felt he always had to say 'yes'" to franchisor's representative, but ultimately rejecting vicarious liability). In sum, there is no triable issue under any one of the three prongs described in *Martinez*, and summary judgment must be granted in favor of McDonalds as to that theory of liability.

E. Joint Employer Status Under "Ostensible Agency" Theory

There remains, however, a genuine issue of material disputed fact regarding the existence of an ostensible agency relationship. "Ostensible agency exists where (1) the person dealing with the agent does so with reasonable belief in the agent's authority; (2) that belief is 'generated by some act or neglect of the principal sought to be charged,' and (3) the relying party is not negligent." *Ochoa*, 133 F. Supp. 3d at 1239 (quoting *Kaplan v. Coldwell Banker Residential Affiliates, Inc.*, 59 Cal. App. 4th 741, 747 (1997)).

As a threshold matter, McDonalds invokes *Patterson*, which found "uniform workplace standards" intended to protect the brand do not establish actual agency. 60 Cal. 4th at 497 n.21. Given McDonalds' uniforms, logos, and food packaging, without more, are insufficient to find "true agency," McDonalds insists they cannot support ostensible agency. This argument is

[12] This was true because "a franchise contract consists of standards, procedures, and requirements that regulate each store for the benefit of *both* parties." *Patterson*, 60 Cal. 4th at 497 (emphasis added). The approach "minimizes chain-wide variations that can affect product quality, customer service, trade name, business methods, public reputation, and commercial image." *Id.*

compelling: "[a]nalysis of the franchise relationship" must heed "contemporary realities," and plaintiffs' theory stands in tension with the trademark protections sanctioned by the court in *Patterson*. 60 Cal. 4th at 478. Not just that, in the franchising context, ostensible agency has been found in interactions generally involving *non-employees* who had isolated or short-term contact with the defendants. *See, e.g.*, *Kaplan*, 59 Cal. App. 4th at 744, 747–48 (individual client sued real estate brokerage companies for fraud and breach of contract after investment fell through); *Kuchta v. Allied Builders Corp.*, 21 Cal. App. 3d 541, 544–45 (1971) (homeowners sued building companies for fraud and breach of contract); *Miller v. McDonald's Corp.*, 150 Or. App. 274 (1997) (consumer sued McDonald's after discovering foreign object in her food); *but see Miller v. D.F. Zee's, Inc.*, 31 F. Supp. 2d 792 (1998) (sexual harassment lawsuit involving Denny's employees). That distinction makes sense—third parties who, unlike plaintiffs, lack an ongoing relationship with a franchisee must rely "on the appearance of agency arguably because they ha[ve] no other knowledge of the actual relationship between the franchisee and the franchisor." *Gray v. McDonald's USA, LLC*, 874 F. Supp. 2d 743, 752 (E.D. Tenn 2012). All of that said, *Patterson* expressly declined to address ostensible agency. 60 Cal. 4th at 494 n.18 ("There is no issue of ostensible agency in the present case."). California courts also permit it even when rejecting actual agency based on the same evidence.[13] *See Kaplan*, 59 Cal. App. 4th at 747–48 (denying summary judgment on ostensible agency based on the "venerable name, Coldwell Banker, the advertising campaign, [and] the logo" among other things). As there is no authority foreclosing a finding of ostensible agency in the present context, plaintiffs will not be precluded as a matter of law from raising the argument here.

Looking at the record, there is considerable evidence, albeit subject to dispute, that McDonalds caused plaintiffs reasonably to believe Haynes was acting as its agent. To begin, plaintiffs uniformly declare they believed both they *and Haynes* worked for McDonalds. Salazar

[13] Unlike the standards for true agency, which focus on the exercise of control, the ostensible agency inquiry looks at whether McDonald's, through an act or omission, caused plaintiffs reasonably to believe Haynes was its agent.

Decl. ¶ 2; Zarate Decl. ¶ 2; Lopez Decl. ¶ 2. They also must wear McDonalds uniforms, prepare and serve McDonalds food in McDonalds packaging, and greet customers by saying "Welcome to McDonald's." *See, e.g.*, Salazar Decl. ¶ 2(a). Plaintiffs' managers, who were subject to training by McDonalds and interacted regularly with McDonalds consultants, wore McDonalds' uniforms, and referred to themselves as "working for McDonald's." *See, e.g.*, Salazar Decl. ¶¶ 2(b), (c). Salazar and Lopez applied through a McDonalds website, which said they were seeking "a job opportunity with McDonald's." Salazar Dep. 33:1–34:23; Salazar Decl. ¶ 2(f); Lopez Dep. 31:12–25; Lopez Decl. ¶ 2(g). Zarate's written application likewise was emblazoned with McDonalds' logos. Zarate Dep. 21:3–9 & Ex. 1. As noted above, McDonalds was responsible for some of the content contained in plaintiffs' orientation materials, *see* Haynes Sr. Dep. 146:11–18, and plaintiffs also received documents styled as "McDonald's Store Policies." Lopez Dep. Ex. 12. Although Kimberly Keeton, a Haynes employee, attests she tells interviewees they are applying to work for a franchisee, she did not interview Salazar, Lopez, or Zarate. Salazar Decl. ¶ 5; Zarate Dep. 21:3–24:9; Lopez Decl. ¶ 4. Plaintiffs contend nobody ever told them McDonalds was *not* their employer, Lopez Decl. ¶ 5; Zarate Decl. ¶ 2(g); Salazar Decl. ¶ 6, and plaintiffs themselves had direct interaction with McDonalds' business consultants, *see, e.g.*, Salazar Dep. 111:2–16; Zarate Dep. 150:8–151:12. As to reliance, plaintiffs submit they sought employment at McDonalds because it "is a large corporation with many stores around the world," "would involve a steady job in a safe environment," and "would make sure [they were] paid and treated correctly, because it is a large corporation with standardized systems." *See, e.g.*, Salazar Decl. ¶ 3.

On the other hand, the evidence McDonalds invokes establishes a genuine dispute over the reasonableness of plaintiffs' beliefs that Haynes was acting as McDonalds' agent. For instance, McDonalds notes the online employment applications *also* state plaintiffs "were applying for employment with an independently owned and operated McDonald's franchisee, a separate company and employer from McDonald's Corporation and any of its subsidiaries." Lopez Dep. Exs. 1, 2; Salazar Dep. Exs. 1, 2. Importantly, similar disclosures, while persuasive, have not been found automatically to defeat the reasonableness of an individual's beliefs. *See, e.g.*, *Kaplan*, 59

Cal. App. 4th at 744 (noting presence of disclaimer); *Miller v. McDonald's Corp.*, 150 Or. App. 274, 284 (1997) (concluding there was a disputed issue over whether one disclosure was sufficient to defeat the impression of control cultivated by the franchisor).

Though it is a close call, particularly as plaintiffs are long-term employees, viewing the evidence in the light most favorable to plaintiffs, a jury could reasonably find McDonalds to be a joint employer by virtue of an ostensible agency relationship. The motion for summary judgment must accordingly be denied as to that theory underlying the alleged Labor Code violations.[14]

F. Negligence

To sustain the negligence claim, plaintiffs must show McDonalds owed them a duty of care, the duty was breached, McDonalds' conduct caused the breach, and they suffered damages. *See McIntyre v. Colonies-Pac., LLC,* 228 Cal. App. 4th 664, 671 (2014). Plaintiffs aver McDonalds' duty arises from its position as a direct beneficiary of their services. Compl. ¶ 212. They further insist McDonalds did not exercise due care in its contracting and supervision of the Haynes Partnership. *Id.* ¶ 212. Specifically, they assert McDonalds knew or should have known Haynes was violating their "employment law rights" because "McDonald's closely monitored, supervised, and controlled Haynes Partnership restaurant operations, including the hours worked by Plaintiffs . . . the breaks received by those crew members, the amounts paid to those crew members, and the conditions under which those crew members labored." Compl. ¶ 137. As a result of this conduct, plaintiffs maintain they suffered lost wages. *Id.* ¶ 215.

Summary judgment will be granted in favor of McDonalds on the negligence claim, as required by California's new right-exclusive remedy doctrine. "As a general rule, where a statute creates a right that did not exist at common law and provides a comprehensive and detailed remedial scheme for its enforcement, the statutory remedy is exclusive." *Rojo v. Kliger*, 52 Cal.

[14] Conspiracy and aiding and abetting theories of liability appear in the complaint and are addressed in McDonalds' opening brief, but plaintiffs do not press those theories in opposition, and they are not factually supported. Accordingly, summary judgment will be entered in favor of McDonalds on those theories of liability.

3d 65, 79 (1990). The California Court of Appeal has found the Labor Code statutes regulating minimum wages, rest breaks, meal breaks, and pay stubs "created new rights and obligations not previously existing in the common law" and "provide[] a comprehensive and detailed remedial scheme for [their] enforcement." *Brewer v. Premier Golf Properties*, 168 Cal. App. 4th 1243, 1253–54 (2008). As plaintiffs' negligence claim asserts the same factual basis underlying its Labor Code claims, they may not deploy the common law to "duplicate the theories of liability [they] assert under the California Labor Code."[15] *Ochoa*, 133 F. Supp. 3d at 1241. *See also Santiago v. Amdocs, Inc.*, No. C 10–4317 SI, 2011 WL 1303395, at *3–4 (N.D. Cal. Apr. 2, 2011) (declining to permit common law conversion claim based on statutory wage and hour violations); *Helm v. Alderwoods Grp., Inc.*, 696 F. Supp. 2d 1057, 1077–78 (2009) (concluding "common law claims premised on [Labor Code violations] are therefore preempted").

V. CONCLUSION

Viewing the undisputed evidence in the light most favorable to plaintiffs, McDonalds did not retain or exert direct or indirect control over plaintiffs' hiring, firing, wages, hours, or material working conditions. Nor did McDonalds suffer or permit plaintiffs to work, engage in an actual agency relationship, participate in a conspiracy, or aid and abet the alleged wage and hour violations. Accordingly, summary judgment for defendants will be entered on those theories. The motion for summary judgment also will be granted as to plaintiffs' negligence claim. The motion must be denied in part, however, because plaintiffs' Labor Code claims may proceed under an ostensible agency theory.

The only disputed sealing issue is exhibit 30 to the deposition of Jennie Watt. *See* Dkt. No. 155, Ex. P-30. McDonalds demonstrates adequately that the document describes in detail its

[15] Plaintiffs invoke *Carillo v. Schneider Logistics, Inc.*, No. CV 11-8557 CAS (DTBx) (C.D. Cal. May 13, 2013), which denied a motion to dismiss a negligence claim against Walmart based on allegations that Walmart failed to exercise due care in hiring and supervising a subcontractor who employed the plaintiffs. Plaintiffs' negligence claim, however, fundamentally is premised on McDonalds' monitoring, supervision, and control of their working conditions, and thus is an attempt to "hold [McDonalds] liable in negligence due to [McDonalds'] violations of the California employment statutes." *Carillo*, No. CV 11-8557 CAS (DTBx) at 11.

internal franchising strategy, and that disclosure may subject it to competitive harm. Exhibit 30 therefore appropriately may be filed under seal. The remaining requests will be dealt with in a separate order.

IT IS SO ORDERED.

Dated: August 16, 2016

RICHARD SEEBORG
United States District Judge